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No. 80-66

In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID FRANK GOLDBERG, PETITIONER

v.

WARDEN, ALLENWOOD FEDERAL PRISON CAMP, MONTGOMERY, PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Parole Commission violated the terms of petitioner's plea agreement or the presumption of innocence by considering conduct underlying counts that were dismissed under the plea agreement in making its parole determination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not yet reported. The opinion of the district court (Pet. App. 15a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1980. The petition for a writ of certiorari was filed on July 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In an indictment filed in the United States District Court for the District of Massachusetts, petitioner was charged, together with five individual co-defendants and two corporate co-defendants, with defrauding the government of well over $1,000,000 in connection with sales of meat to the Department of Defense (C.A. App. 6).[1] On September 26, 1977, after extensive plea negotiations, petitioner entered a plea of guilty to a one-count information charging him with concealing a material fact from the Department of Defense, in violation of 18 U.S.C. 1001 (C.A. App. 14-15, 33, 72). In accordance with the plea agreement, additional charges against petitioner that had been contained in the indictment were dismissed with prejudice (C.A. App. 15, 72), but the government specifically reserved the right "to comment on the evidence against [petitioner]" at sentencing (C.A. App. 14).

On January 4, 1978, petitioner was sentenced to four years' imprisonment and a fine of $10,000 (C.A. App. 33, 36, 72). The sentencing judge had before him a

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[1] "C.A. App." refers to the joint appendix filed in the court of appeals.

presentence report that contained a complete description of petitioner's offense. The report stated that the Defense Contract Audit Agency had analyzed the records of the companies in which petitioner was involved and had concluded that these companies "defrauded the Department of Defense of at least one million, four hundred and sixty eight thousand, nine hundred and fifty one dollars" (C.A. App. 34-35).

2. At petitioner's initial parole hearing on May 4, 1978, the hearing panel relied upon the presentence report for information concerning petitioner's offense (C.A. App. 35). The hearing summary contained a detailed description of the circumstances of petitioner's offense, including the substantial sum of which the government had been defrauded (C.A. App. 36).[2] The hearing summary also observed that petitioner "freely admits to his part in the commission of the offense" (C.A. App. 37).

Because a fraud in excess of $500,000 was involved, the Parole Commission classified petitioner's offense behavior as "Greatest Severity I" (C.A. App. 38, 41, 43). Petitioner was initially "continued to expiration" (meaning that he would have to serve the full sentence imposed less good

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[2]Petitioner, together with others, owned and operated two meat packing companies that supplied meat to the Department of Defense. Scientific tests showed that the meat was inferior in quality to what petitioner had represented, with a difference in value of $2.00 per pound. Sample lots were examined and found not to conform to specifications for a variety of reasons, including underweight portions, protruding tendons, and the presence of foreign materials. In addition, from June 1974 to June 1975, petitioner's co-defendant Harry Goldberg paid a total of $11,200 in bribes and provided other favors to government meat inspectors in exchange for favorable inspection reports. Petitioner was described as a "passive participant" who did not participate directly in bribing the inspectors, but who was fully aware of and profited from the scheme (C.A. App. 36, 38).

time credits), but this decision was modified on administrative appeal, and petitioner was given a presumptive parole date of March 19, 1980 (C.A. App. 41-43, 72-73).

3. On February 27, 1979, petitioner who was then incarcerated at the Allenwood Federal Prison Camp, filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2241, arguing, *inter alia*, that his continued incarceration was unlawful because it was based on the Parole Commission's consideration of the counts of the indictment that had been dismissed with prejudice pursuant to the plea agreement (C.A. App. 6-7). In response, the government argued that the Commission was entitled to consider the allegations underlying the dismissed counts as aggravating circumstances that justified an increase in petitioner's offense severity rating (C.A. App. 28). See 28 C.F.R. 2.20(d).

In an order dated June 28, 1979, the district court granted in part the petition for a writ of habeas corpus, ruling that the Commission may not consider facts concerning an offense if the indictment for the offense has been dismissed with prejudice (Pet. App. 15a-22a). The court acknowledged that petitioner "has not challenged the information set forth in the hearing summary" (*id.* at 18a) and that numerous cases have held that the Parole Commission "may consider dismissed counts of the indictment as part of the alleged offense in determining the proper offense severity rating" (*id.* at 20a). But the court noted that none of these cases involved a dismissal with prejudice (*ibid.*). The court concluded that because the government was "forever barred" from prosecuting petitioner on the dismissed counts, and because "there is no reliable evidence on the record" supporting the counts, the Commission erred in considering them (*id.* at 20a-21a). Accordingly, the court ordered the Commission to

afford petitioner a new parole hearing within 30 days, at which petitioner's offense severity would be measured solely on the basis of the one count to which he pleaded guilty (*id.* at 21a).[3]

4. The court of appeals reversed (Pet. App. 1a-14a). As to petitioner's claim that the Parole Commission could not lawfully consider the facts underlying the dismissed counts in the indictment, the court held that the Commission enjoys "wide discretion to review material that would be helpful in its determination whether to release a prisoner on parole" (*id.* at 8a), including information in a presentence report (see 18 U.S.C. 4207(3)). Because the details relating to the dismissed counts were reflected in the presentence report, the court held that the Commission had not gone beyond the sources of information that it was lawfully entitled to consider (Pet. App. 8a-10a).

The court likewise rejected petitioner's claim that the terms of the plea bargain prohibited the Commission from considering the facts underlying the dismissed counts (Pet. App. 10a-12a). The reference to the dismissed counts as having been dismissed "with prejudice" merely meant that the conduct underlying those counts could not be the subject of a later prosecution; it did not mean that that conduct could not be considered in making a parole determination. In sum, the court concluded, the phrase "with prejudice," standing alone, "does not bar comment in the presentence report about the charges in the dismissed counts and does not prevent consideration of

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[3]On July 25, 1979, the district court granted a stay of its order pending the government's appeal (C.A. App. 3). On the consent of the government, petitioner was enlarged from custody pending the disposition of the appeal (Pet. App. 6a n.3). Petitioner remains at large pending the disposition of the instant petition.

that conduct by the Parole Commission in weighing all the factors bearing on the nature of the offense and the prisoner's character as well" (*id.* at 11a).

Because of the procedural posture of the case, the court of appeals was not able to resolve all of the outstanding issues. Petitioner, the court noted, asserted that the government had expressly promised not to use the allegations of the dismissed counts in considering his eligibility for parole, even though the plea agreement contained no such representation on its face (Pet. App. 13a). Accordingly, the court remanded the case to the district court to resolve the remaining issue and to enter a final judgment in light of its disposition of that issue (*ibid.*).

ARGUMENT

1. We note initially that there is no reason for the Court to grant the petition for a writ of certiorari at this time. The petition challenges the court of appeals' reversal of the district court's order granting the writ of habeas corpus. The court of appeals, however, has remanded the case to the district court for further findings on a related factual claim raised by petitioner. Review now by this Court would be premature. Petitioner may prevail on his factual claim in the district court or the court of appeals, in which case the arguments presented in the petition will be moot. If, on the other hand, his factual claim is rejected, he will be able to present all of his contentions to this Court by way of a petition for a writ of certiorari seeking review of the judgment finally denying his petition for a writ of habeas corpus. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

2. On the merits, petitioner first contends (Pet. 12-14) that the Parole Commission acted in contravention of the terms of the plea agreement. As the court of appeals

correctly pointed out (Pet. App. 10a-11a), however, there was nothing in the express terms of the plea agreement that prohibited the Parole Commission from considering the facts underlying the dismissed counts. And, to the extent that petitioner contends that the plea agreement was intended to have that effect, he will have the opportunity on remand from the court of appeals to show, as he claims, that the government made additional representations relating to the question of parole consideration (see *id.* at 13a).

The effect of a dismissal with prejudice is to preclude the government from bringing additional charges against a defendant for the same conduct. But the agreement not to prosecute has been fulfilled: the government has not prosecuted petitioner on any further charges. The determination not to release a prisoner on parole cannot fairly be viewed as "prosecution" or punishment on a charge that has been dropped any more than imposition of a relatively harsh sentence based on the court's belief that a defendant lied at trial is punishment for a charge of perjury that has never been filed. See *United States* v. *Grayson*, 438 U.S. 41, 50 (1978). Petitioner's bargain reserved the prosecutor's "right to comment on the evidence against this defendant" (C.A. App. 14). Thus, even if the bargain required the sentencing judge and the Commission to regard the dismissed counts as if they had never existed, it did not—and could not—require that petitioner's total criminal conduct be treated as if it had never occurred.

3. Petitioner also contends (Pet. 14-16) that the Parole Commission's consideration of the conduct underlying the dismissed counts was improper because it offended the presumption of innocence.

To begin with, the Commission in this case did not consider "counts of an indictment" that were dismissed with prejudice (see Pet. 14). The Commission did not examine the allegations of the dismissed counts in the indictment as such (see Pet. App. 7a n.4). Instead, the Commission simply took into account detailed information in the presentence report concerning petitioner's criminal conduct—the same information that was before the district judge who imposed sentence upon petitioner. See generally *United States* v. *Addonizio*, 442 U.S. 178, 182 & n.5 (1979). That the information concerned offenses of which petitioner was not and will never be convicted is immaterial, since in determining whether a prisoner should be released on parole, the Commission, like the court in fixing punishment, is free to consider all types of information concerning an offender's background and behavior, including information relating to offenses with which the offender has not been charged, and offenses that have been dismissed pursuant to a plea agreement. See *Billiteri* v. *United States Board of Parole*, 541 F. 2d 938, 944 (2d Cir. 1976); *Bistram* v. *United States Parole Board*, 535 F. 2d 329, 330 (5th Cir. 1976); *Brown* v. *Lundgren*, 528 F. 2d 1050, 1055 (5th Cir.), cert. denied, 429 U.S. 917 (1976); *Grattan* v. *Sigler*, 525 F. 2d 329, 331 (9th Cir. 1975); *Smith* v. *Bell*, 462 F. Supp. 55, 56 (N.D. Tex. 1978), aff'd, 588 F. 2d 169 (5th Cir. 1979); *Narvaiz* v. *Day*, 444 F. Supp. 36, 37-38 (W.D. Okla. 1977); *McArthur* v. *United States Board of Parole*, 434 F. Supp. 163, 166-167 (S.D. Ind. 1976), aff'd, 559 F. 2d 1226 (7th Cir. 1977); *Foddrell* v. *Sigler*, 418 F. Supp. 324, 325-326 (M.D. Pa. 1976); *Manos* v. *United States Board of Parole*, 399 F. Supp. 1103, 1105 (M.D. Pa. 1975); *Lupo* v. *Norton*, 371 F. Supp. 156, 159-162 (D. Conn. 1974). These cases recognize that "[t]he function of the [Commission] is not limited to search for indictments and convictions, but it must determine whether a prisoner is a

fit subject for release. It is vested with broad discretion in order that it may examine all aspects of an individual's character." *McArthur* v. *United States Board of Parole, supra*, 434 F. Supp. at 167. See *Greenholtz* v. *Inmates*, 442 U.S. 1, 4-5 (1979).

Congress has provided that in exercising this discretion the Commission must consider, among other things, "the nature and circumstances of the offense." 18 U.S.C. 4206(a). In order for the Commission properly to evaluate the offense, Congress has specifically authorized, and in fact required, the Commission to consider a broad range of information from a variety of sources, including presentence investigation reports, if available and relevant. 18 U.S.C. 4207(3). The statute contains no restrictions or preconditions on the Commission's discretion to review this material. See S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 28 (1976).[4]

In light of these well-settled principles, petitioner's reference to the "presumption of innocence" is wholly inapposite. As this Court held in *Bell* v. *Wolfish*, 441 U.S. 520, 533 (1979), the presumption of innocence

> is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his

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[4]The Conferees expressed the intent "that the Parole Commission, in making each parole determination, shall recognize and make a determination as to the relative severity of the prospective parolee's offense * * *." S. Conf. Rep. No. 94-648, *supra*, at 25. In addition, the Conference Report states that in making a parole release determination above the guidelines, the Commission may consider such factors as "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy prior record, or was part of a large scale conspiracy or continuing criminal enterprise." *Id.* at 27.

> arrest, indictment, or custody, or from other matters not introduced as proof at trial.

But, as the Court held in *Bell* v. *Wolfish, supra,* the "presumption" does not govern the rights of pretrial detainees during confinement before trial. Likewise, it does not apply to the rights of an inmate in the course of a parole eligibility determination. To suggest that the presumption of innocence requires that the Parole Commission ignore all criminal conduct that has not been the subject of a conviction would create the odd anomaly that the Commission would be able to consider all unfavorable conduct except that conduct that was arguably criminal in nature. Neither the governing statutes nor the Due Process Clause requires such a curious result.

Finally, there is no reason in this case to doubt the reliability of the information considered by the Commission. As the district court noted (Pet. App. 18a), petitioner has not challenged the accuracy of that information, which was based on scientific tests and an audit of business records. Moreover, at his parole hearing, petitioner freely admitted his part in the fraud that the evidence so clearly established (C.A. App. 34-37). The information is thus no less reliable than it would have been if petitioner had never been charged with the dismissed counts, or if the counts had been dismissed as part of a plea arrangement without a specification that the dismissal was with prejudice. Indeed, it is as reliable or more reliable than other kinds of information, frequently including hearsay and accomplice testimonials, ordinarily described in presentence reports and used by trial courts in setting appropriate sentences.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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